

FP09-07 Executive Summary			
General Description	<p>Proposal FP09-07 requests that Ninilchik be added to the communities with a positive customary and traditional use determination for harvesting all fish in the Kenai Peninsula District waters north of and including the Kenai River drainage within the Kenai National Wildlife Refuge and the Chugach National Forest.</p> <p><i>Submitted by Ninilchik Traditional Council</i></p>		
Proposed Regulation	<p>COOK INLET AREA</p> <p><i>Kenai Peninsula District— Waters north of and including the Kenai River drainage within the Kenai National Wildlife Refuge and the Chugach National Forest.</i> <i>All fish</i> <i>Residents of the communities of Ninilchik, Hope and Cooper Landing.</i></p> <p><i>*Kenai Peninsula District— Waters north of and including the Kenai River drainage within the Kenai National Wildlife Refuge and the Chugach National Forest.</i> <i>Salmon</i> <i>Residents of the community of Ninilchik</i></p> <p>*NOTE: This portion of the regulation that should be deleted was not included in the proposal book in error.</p>		
Southcentral Regional Council Recommendation	<p>Support Proposal FP09-07 with modification to specify use of Dolly Varden/Arctic char, lake trout, and rainbow/steelhead only.</p> <p>The modified regulation should read:</p> <p>COOK INLET AREA</p> <p><i>Kenai Peninsula District— Waters north of and including the Kenai River drainage within the Kenai National Wildlife Refuge and the Chugach National Forest.</i> <i>All fish</i> <i>Residents of the communities Hope and Cooper Landing.</i></p> <p><i>Kenai Peninsula District— Waters north of and including the Kenai River drainage within the Kenai National Wildlife Refuge and the Chugach National Forest.</i> <i>Salmon, Dolly Varden/ Arctic char, lake trout, and rainbow/ steelhead trout</i> <i>Residents of the community of Ninilchik</i></p>		

continued on next page

WP09-07 Executive Summary (continued)	
Interagency Staff Committee Comments	See comments following the analysis.
ADF&G Comments	Oppose
Written Public Comments	1 Oppose

REGIONAL ADVISORY COUNCIL RECOMMENDATION FP09-07

SOUTHCENTRAL REGIONAL ADVISORY COUNCIL

Support Proposal FP09-11 **with modification** to also include Dolly Varden/Arctic char, lake trout, and rainbow/steelhead only.

The modified regulation should read:

COOK INLET AREA

*Kenai Peninsula District—
Waters north of and including
the Kenai River drainage
within the Kenai National
Wildlife Refuge and the
Chugach National Forest.*

All fish

*Residents of the communities
of Hope and Cooper Landing.*

*Kenai Peninsula District—
Waters north of and including
the Kenai River drainage
within the Kenai National
Wildlife Refuge and the
Chugach National Forest.*

*Salmon,
**Dolly Varden/
Arctic char,
lake trout,
and rainbow/
steelhead
trout***

*Residents of the community of
Ninilchik*

There is documented use of fish in the Kenai River by residents of Ninilchik. It is the nature of subsistence to use what is harvested. Harvest of resources is opportunistic, often associated with other subsistence activities. The Council recommended the customary and traditional use determination be limited to fresh water fish species that were historically harvested prior to 1952 when subsistence fishing was allowed.

STAFF ANALYSIS FP09-07

ISSUES

Proposal FP09-07, submitted by the Ninilchik Traditional Council (NTC), requests that Ninilchik be added to the communities with a positive customary and traditional use determination for harvesting all fish in the Kenai Peninsula District waters north of and including the Kenai River drainage within the Kenai National Wildlife Refuge and the Chugach National Forest (**Map 1**).

DISCUSSION

Ninilchik has a positive customary and traditional use determination for all fish in the Kasilof River drainage. In the Kenai River Area (defined as the waters north of and including the Kenai River drainage within the Kenai National Wildlife Refuge and the Chugach National Forest), the Federal Subsistence Board (Board) has recognized the customary and traditional uses of salmon, but not resident species, by Ninilchik residents. The proponent of Proposal FP09-07 requests that the Board recognize the community of Ninilchik's customary and traditional uses of all fish in the Kenai River Area, similar to its uses of salmon.

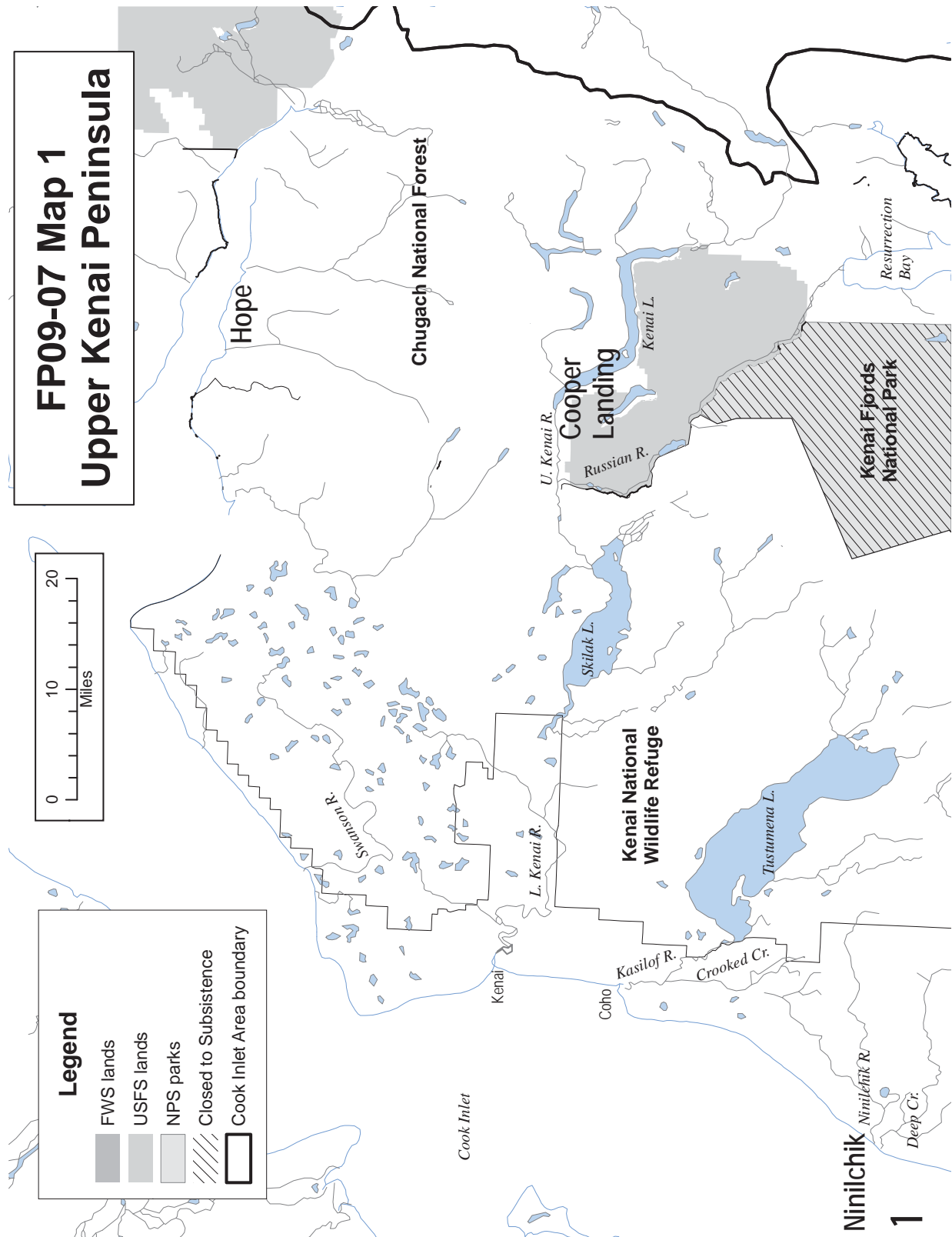
The analysis for this proposal incorporates information from ethnographic studies, public testimony and written comments at meetings of the Southcentral Alaska Subsistence Regional Advisory Council (Southcentral Council) and the Board, and the staff analyses of: 1) Proposal FP06-09, addressed by the Board at its January 2006 public meeting (FSB 2006a); 2) Fisheries requests for reconsideration (FRFR) FRFR06-02/03/08, addressed by the Board at its November 2006 work session (FSB 2006b); 3) FRFR06-09 addressed by the Board at its May 2, 2007 public meeting (FSB 2007a) and again at its September 13, 2007 work session (FSB 2007b); and 4) Proposal FP07-28 (FSB 2007c) addressed by the Board at its May 8, 2007 public meeting.

The analysis for this proposal focuses on the uses of resident fish (nonsalmon freshwater fish) in the Federal public waters of the Kenai River Area by the residents of Ninilchik.

Existing Federal Regulation

COOK INLET AREA

<i>Kenai Peninsula District—Waters north of and including the Kenai River drainage within the Kenai National Wildlife Refuge and the Chugach National Forest.</i>	<i>All fish</i>	<i>Residents of the communities of Hope and Cooper Landing.</i>
<i>Kenai Peninsula District—Waters north of and including the Kenai River drainage within the Kenai National Wildlife Refuge and the Chugach National Forest.</i>	<i>Salmon</i>	<i>Residents of the community of Ninilchik</i>



Proposed Federal Regulation

COOK INLET AREA

Kenai Peninsula District—Waters north of and including the Kenai River drainage within the Kenai National Wildlife Refuge and the Chugach National Forest.

All fish

*Residents of the communities of **Ninilchik**, Hope and Cooper Landing.*

~~**Kenai Peninsula District—Waters north of and including the Kenai River drainage within the Kenai National Wildlife Refuge and the Chugach National Forest.*~~

Salmon

*Residents of the community of **Ninilchik***

*NOTE: This portion of the regulation that should be deleted was not included in the proposal book in error.

Extent of Federal Public Waters

The areas affected by this proposal include the Federal public waters in the Cook Inlet Area north of and including the Kenai River within the Kenai Peninsula District within the exterior boundaries of the Kenai National Wildlife Refuge (Kenai Refuge) and the Chugach National Forest (**Map 1**) (referred to as the Kenai River Area in this analysis).

For purposes of this discussion, the phrase “Federal public waters” is defined as those waters described under 50 CFR 100.3.

Regulatory History

Until 1952, freshwater streams in the Kenai Peninsula were open to subsistence fishing. In 1952, all streams and lakes of the Kenai Peninsula were closed to subsistence fishing under Territory of Alaska regulations and only rod and reel or hook or line were allowed for “personal use” (Fall et al. 2004:25–26). Since 1952, it has been illegal for Ninilchik residents to subsistence fish for resident fish species in the Kenai River Area. (See Proposal FP06-09 staff analysis for a more complete regulatory history of fishing in the Kenai Peninsula, as well as Appendix B, Table 1 in FP06-09, for a summary of the history of Cook Inlet subsistence and personal use salmon fishing regulations).

Federal regulations for subsistence fisheries were first established in 1999 when the Federal program assumed limited fisheries management authority. For salmon, trout, Dolly Varden, and char in Cook Inlet there were no customary and traditional use determinations; therefore, all rural residents of Alaska qualified under the Federal program as eligible subsistence users.

In 2001, the Board considered Proposal FP02-11a, submitted by NTC, Stephen Vanek and Fred H. Bahr, that requested a positive customary and traditional use determination for all fish and all shellfish in the Cook Inlet Area for residents of the Kenai Peninsula District. The Board deferred making decisions on the use of fish in the Cook Inlet Area until the completion of an OSM funded study, Cook Inlet Customary and Traditional Subsistence Fisheries Assessment (Fall et al. 2004), because the Board felt that historical, contemporary, community and area specific harvest use information was needed to properly analyze customary and traditional patterns of use in the Cook Inlet region.

During the 2001 cycle, there was also a staff analysis for the combined proposals, Proposal FP01-13/33, on the customary and traditional use portion for salmon only. During its December 2000 meeting,

the Board deferred action until after a decision on the Kenai Peninsula rural determination request for reconsideration (RFR). A decision on the Kenai Peninsula rural RFR was made on June 28, 2001, rescinding the May 2000 decision which made the whole Kenai Peninsula rural and reverting to the 1991 rural determinations. Therefore, during the 2002 regulatory cycle, the customary and traditional use analysis for salmon was revised to include only communities determined to be rural as a result of the June 2001 RFR decision and an analysis of the use of the other requested fish species was incorporated. A decision on the customary and traditional use of shellfish also was deferred.

In December 2001, the Board considered Proposals FP02-11b through 14b for seasons and harvest limits for fish in the Cook Inlet Area (FSB 2001:97–105). The Board adopted regulations that allowed the subsistence take of salmon, Dolly Varden, trout, and char with seasons, harvests, possession limits, and methods and means that were the same as for the taking of fish under State of Alaska sport fishing regulations (FSB 2001:102–105). The modification of the proposal was considered an interim step while needed information gathering and further analysis continued (FSB 2001:103).

The Board did not consider any further regulatory proposals for the Cook Inlet Area until 2006, thus from 2002 to 2006 all Federally qualified rural residents, including Ninilchik, could harvest fish under Federal subsistence regulations in the Cook Inlet Area. With new information available (Fall et al. 2004), the Board took up consideration of customary and traditional use determinations, and continued to defer proposals for take until completion of those deliberations. During this time, no proposals for harvest were under consideration, and regulations for subsistence harvest were identical to State of Alaska sport fishing regulations with the exception of the temporary 2006-2007 winter subsistence fishery for resident species in Tustumena Lake that was established in November 2006 when the Board adopted fisheries special action FSA06-01b.

In January 2006, the Board considered Proposal FP06-09 (FSB 2006a), the deferred proposal from the 2002 regulatory cycle, Proposal FP02-11a. Proposal FP06-09 was submitted by NTC, Stephen Vanek and Fred H. Bahr and requested a positive customary and traditional use determination for all fish and all shellfish in the Cook Inlet Area for residents of the Kenai Peninsula District. During the January 2006 public meeting, the Board applied the eight factors to determine specific communities' use in Cook Inlet as described in §___ .16 (50 CFR 100.16(b) and 36 CFR 242.16(b)). Those customary and traditional use determinations for Cook Inlet are largely based upon information provided by Fall et al. 2004 and presented in the staff analysis for Proposal FP06-09.

At its January 2006 public Board meeting, the Board made a positive customary and traditional use determination for: 1) Hope and Cooper Landing for all fish in the Federal public waters of the Kenai Peninsula District, north of and including the Kenai River drainage within the Kenai National Wildlife Refuge and the Chugach National Forest; and 2) Ninilchik for all fish in the Federal public waters of the Kasilof River drainage. During consideration of Proposal FP06-09, both ADF&G and NTC indicated that they could provide additional relevant information; hence, the Board's characterization of the customary and traditional use determinations as "interim." The intent in using the word interim was to "signal to everybody that we're not done yet, we're just starting, and that's all it was meant to do" (FSB 2006a:507–508). The Board's decision provided an opportunity to gather information to provide a more definitive picture of historic and current use patterns on Federal public lands throughout the various drainages on the Peninsula and to better integrate the information from the two BIA funded studies that were not fully available when Dr. Fall's study was completed (FSB 2006a:500–501).

In May of 2006, the State of Alaska and the NTC submitted requests for reconsideration (FRFR06-02/03/08) of the Board's customary and traditional use determinations made in January 2006. The Board

revisited its decision in a work session on November 16–17, 2006 and added Ninilchik to the customary and traditional use determination for all fish for the Kenai River Area. The ADF&G, Division of Subsistence, provided new information on the levels of use of the Kenai River Area by Ninilchik residents (FSB 2006b).

In a public meeting on May 2, 2007, the Board considered FRFR06-09, submitted by the State of Alaska, which requested that the Board reconsider and rescind its decision of November 17, 2006 on FRFR06-02/03/08 that recognized the community of Ninilchik's customary and traditional use of all fish in the Kenai Peninsula District. The Board considered this RFR, but a motion to amend the existing customary and traditional use determination failed and the original decision from November 2006 remained in place (FSB 2007a). On September 13, 2007, the Board met in a work session to correct a voting error from the May 2, 2007 meeting that did not comply with Robert's Rules of Order. The Board modified the existing determination through a new motion that found a positive customary and traditional use determination for the community of Ninilchik for salmon only in the Kenai River Area (FSB 2007b). The customary and traditional use determination for Hope and Cooper Landing residents for all fish in the Kenai River Area remained in place as did the customary and traditional use determination for Ninilchik residents for all fish in the Kasilof River drainage.

On May 8, 2007, the Board considered a proposal from the Kenai River Sportfishing Association (Proposal FP07-28) requesting that the positive customary and traditional use determinations for taking all fish by Hope, Cooper Landing, and Ninilchik residents be rescinded in the Kenai Peninsula District and that there be no Federal subsistence priority for all fish. The Board rejected this proposal (FSB 2007c).

The Board considered fishery regulatory harvest proposals for Cook Inlet in both 2007 and 2008, and adopted several proposals establishing subsistence fisheries for salmon and resident fish species in the Kenai and Kasilof River drainages. These include dip net salmon fisheries at designated sites in the Kenai, Russian, and Kasilof Rivers; rod and reel salmon and resident species fisheries in the Kenai and Kasilof River drainages; an under-the-ice gillnet and jig resident species fishery in Tustumena Lake, and a temporary fish wheel salmon fishery in the Kasilof River. The Board considered, but did not adopt, a 2008 proposal that would have allowed dip net fishing from the shore in the Moose Range Meadows site of the Kenai River (FWS 2007 and FSB 2007d).

Community Characteristics

The only community under consideration in this analysis is Ninilchik, which is comprised of two census-designated places (CDPs): Ninilchik and Happy Valley. ADF&G subsistence use studies conducted in 2002–03 on Ninilchik included Ninilchik and Happy Valley CDPs (Fall et al. 2004). Thus, when reference is made to Ninilchik in this analysis, it includes people living in the Ninilchik CDP as well as the Happy Valley CDP. In the 2000 U.S. Census, Ninilchik CDP had 772 year-round, permanent residents and Happy Valley had 489 year-round permanent residents (U.S. Census 2001); thus the total population for the two CDPs from the last census under consideration in this analysis is 1,261. In 2008, the estimated population was 778 in Ninilchik CDP and 495 in Happy Valley CDP. There is one school in Ninilchik with 186 students (ADCED 2008).

The Ninilchik tribal government (which is the NTC) is the only local government in the Ninilchik area. There is no local municipal government, although Ninilchik is part of the Kenai Peninsula Borough. The community of Ninilchik is similar to road-connected rural portions of the Copper River Basin where the local governments of communities are tribal, not municipal (Stratton and Georgette 1984).

The Ninilchik tribe had about 652 tribal members in 2006. Of these, about 333 members (51%) lived in the Ninilchik tribal area (Wolfe 2006a).

Ninilchik is within the traditional territory of the Dena'ina Athabaskans, which dates to around 1000 A.D, extends from Kachemak Bay on the Kenai Peninsula, west across Cook Inlet to the Stony River and northeast to the Susitna Basin, as well as the traditional territory of the Sugpiaq (Alutiiq) which includes the southern portion of the Kenai Peninsula, bridging the Sugpiaq territories of Prince William Sound with Kodiak Island and the Alaska Peninsula (de Laguna 1934, Krauss 1982, Stanek 1980).

Non-Native settlement of the Kenai Peninsula began in the 18th century with the Russians and the fur trade, and later mining efforts in Kachemak Bay. At the end of the 19th century, commercial fishing brought about new settlements, such as the herring saltery at Seldovia in 1896. The next major non-Native settlement period began during the Gold Rush era at the end of the 19th century. With the construction of roads and local oil development after about 1950, the population of the Kenai Peninsula increased substantially through in-migration of people born outside Alaska.

Brief history of Ninilchik

The original Ninilchik inhabitants came to the Kenai Peninsula and settled within the traditional territory of two Alaska Native cultures and areas used by non-Native settlers. Long-term residents of Ninilchik trace their origins to the descendents of Alaska Natives (predominately Sugpiaq from Kodiak Island) who married Russian American Company employees and settled on the Kenai Peninsula in the Ninilchik area in 1847 (Wolfe 2006a, b; Arndt 1993). The children of these “mixed marriages” between the Russians and the Alaska Natives were commonly called “Creoles” by the Russians (Fall et al. 2004:33). By 1861, Ninilchik had become a “Creole” settlement because all of the original Russians had died (Arndt 1993:42). The U.S. Census in 1880 enumerated the population at Ninilchik as 53 “Creoles” (Fall et al. 2004:33). In 1890, the U.S. Census noted that there were “50 Russian Creoles and a small number of Tnaina [sic] tribe” (U.S. Census 1890:69). There were 16 “Indians” enumerated (U.S. Census 1890). During the last 160 years, the Ninilchik population has increased and become connected by marriage and birth with other Dena'ina (including the Kenaitze) and Sugpiaq (Alutiiq) groups in the Cook Inlet Area.

By 2006, from the 53 people counted in 1880, the Ninilchik tribe numbered about 652, of which about 333 members live in the Ninilchik tribal area (Wolfe 2006a) (which includes Happy Valley [Williams 2006, pers. comm.]).

The Ninilchik area's population has grown in the past 50 years through in-migration, becoming more demographically diverse (Wolfe 2006a). Georgette (1983:183–184) concluded that Ninilchik's expanding population accounts for an increasing diversity of values, beliefs, and resource harvest and use patterns among its residents. Reed (1985:96) noted that for many long-term Ninilchik residents resource harvesting was an important household economic strategy, but for newcomers resource harvesting was more for recreational purposes. These differences between Ninilchik residents contribute to the lack of a community-wide pattern of resource use, beliefs, and values. For long-term residents, “resource utilization was a tradition and production was family based...for others it was productive recreation or . . . leisure time” (Reed 1985:96).

Happy Valley CDP is a census designated place created by the U.S. Census, but also is considered a residential extension of Ninilchik. Happy Valley was first noted in 1950 by the U.S. Geological Survey as a “geographic location” (ADCED 2008). There are no facilities, no schools, no post office, and no government. Students who reside in Happy Valley go to school in Ninilchik and Happy Valley residents receive their mail in Ninilchik.

Eight Factors for Determining Customary and Traditional Uses

A community or area's customary and traditional use is generally exemplified through the eight factors: (1) a long-term, consistent pattern of use, excluding interruptions beyond the control of the community or area; (2) a pattern of use recurring in specific seasons for many years; (3) a pattern of use consisting of methods and means of harvest which are characterized by efficiency and economy of effort and cost, conditioned by local characteristics; (4) the consistent harvest and use of fish or wildlife as related to past methods and means of taking: near, or reasonably accessible from the community or area; (5) a means of handling, preparing, preserving, and storing fish or wildlife which has been traditionally used by past generations, including consideration of alteration of past practices due to recent technological advances, where appropriate; (6) a pattern of use which includes the handing down of knowledge of fishing and hunting skills, values, and lore from generation to generation; (7) a pattern of use in which the harvest is shared or distributed within a definable community of persons; and (8) a pattern of use which relates to reliance upon a wide diversity of fish and wildlife resources of the area and which provides substantial cultural, economic, social, and nutritional elements to the community or area.

The Board makes customary and traditional use determinations based on a holistic application of these eight factors (50 CFR 100.16(b) and 36 CFR 242.16(b)). In addition, the Board takes into consideration the reports and recommendations of any appropriate Regional Advisory Council regarding customary and traditional use of subsistence resources (50 CFR 100.16(b) and 36 CFR 242.16(b)). The Board makes customary and traditional use determinations for the sole purpose of recognizing the pool of users who meet the eight factors. The Board does not use such determinations for resource management or restricting harvest. If a conservation concern exists for a particular population, the Board addresses that concern through the imposition of harvest limitations or seasonal restrictions rather than by limiting the customary and traditional use finding.

Specific information on each of the eight factors is not required because a community or area seeking a customary and traditional use determination only has to "generally exhibit" the eight factors (50 CFR 100.16(b) and 36 CFR 242.16(b)). However, subtitles are used in this analysis as a management tool to organize the information.

The subsistence way of life is based on contingencies and opportunity (what is available). Many, but not all, subsistence harvests include the bulk harvest and processing of large quantities of fish and wildlife at a time for long-term consumption. However, subsistence harvests may also include small incidental harvests during travel. Because the subsistence way of life is based on contingencies and opportunity, the fact that a harvest may be quite low does not indicate these fisheries are not customary and traditional.

It is important to note that customary and traditional use determinations are based on the uses of the resource and not on the users. The Federal subsistence management program applies to Federally-qualified rural users and does not differentiate between Alaska Native and non-Natives.

Long-term, consistent pattern of use, excluding interruptions beyond the control of the community

When making a customary and traditional use determination, one of the factors considered by the Board is a long-term consistent pattern of use, excluding interruptions beyond the control of the community or area (50 C.F.R. § 100.16(b)(1)). This is an important point to consider, because interruptions beyond the control of Kenai Peninsula residents could affect their harvest and use of fishery resources in Federal public waters. First, subsistence fishing in the freshwaters of the Kenai Peninsula was prohibited from 1952 until the Federal Subsistence Board created a subsistence fishery in 2002 which mirrored the State sport fishing regulations. Second, since statehood, legal availability of fishery resources in Federal

public waters has been defined by State sport fishing regulations, and these regulations do not provide for harvest of all species or harvest by traditional methods and means. In this area, preferred traditional methods and means include nets, an efficient method and means of harvest for subsistence users who traditionally harvest as much fish as they can process at once. Rod and reel is considered a traditional subsistence gear type under Federal subsistence regulations and under State regulations in some parts of the State. In some cases under State regulations, rod and reel have been recognized as traditional gear in places where fish fences or traps are no longer a legal means to harvest fish and rod and reel is the only legal alternative (Williams et al. 2005:31–32). Georgette (1983:185) noted that some Ninilchik residents said they have never learned to fish successfully with a rod and reel and that fishing with a rod and reel consumes too much of their time.

In 1878, the first commercial fish packing operation was established at the Kenai River and the first canneries were established in the 1880s. The fur trade had collapsed, the Russian era had ended, and more American non-Natives had moved into the area. Many Dena'ina fished fall runs of coho salmon up-river along the Kenai and Kasilof river drainages at traditional settlements like Stepanka at Skilak Lake in the Kenai River drainage or camps along the Killey and other tributary rivers (both Skilak Lake and the Killey River are within the Kenai Refuge). The gold rush in the late 1890s brought the first major in-migration of Euro-Americans to the Kenai Peninsula with settlements created at Kenai, Knik, and Hope. With the arrival of the Euro-Americans came new diseases, which caused declines in the Dena'ina population.

Documentation of early fish uses by the Ninilchik residents is not extensive. However, references can be found regarding the fish uses by the Kenaitze. In a book published in 1897 by Henry Elliott, *Our Arctic Province*, Elliott notes that the Kenaitze in Cook Inlet were “fairly independent of salt water, and seldom pass many hours upon it, except in traveling and trading with one another, and the Creoles: they are, however, very expert at fresh-water fishing through holes in the ice for trout in the thousand and one lakes, large and small, which are so common in their country” (Elliott 1897:91).

In the early 1900s, the annual subsistence cycle of the Dena'ina included commercial fishing in the inlet and the mouth of the Kenai River during the spring and summer, and going up-river in the fall to harvest coho salmon, fish for freshwater fish, hunt moose, and trap furbearers. This continued until the 1940s with the creation of the Kenai National Moose Range. In the early 1940s, many Dena'ina continued their traditional pattern of going to the Stepanka camps. By this time, the Dena'ina population had been so decimated by disease that most Dena'ina were predominantly (but not exclusively) in Kenai (Fall et al. 2004:16–20).

Some of the Dena'ina—the Kenaitze—who lived in the Kenai Peninsula are related to those who settled in Ninilchik (FSB 2006b). There were Kenaitze who married into families in Ninilchik as documented in public testimony (FSB 2006a, b) and in *Agrafena's Children*, a history of Ninilchik's families, where reference is made to the intermarriage between Ninilchik and Kenai people, and the intermingling of families (Leman 1993:576) as well as in the U.S. Census in 1890 (see previous discussion under “community characteristics”). As a member of the public from Kenai testified to the Board, “Maybe they're [Ninilchik] not brothers and sisters, maybe they're cousins. But the bottom line is, they're the same [as Kenaitze], you know, whether they originated in a Russian village—they more than likely originated with Native women and they are our brothers and sisters in some sort of way” (FSB 2006b:100). A member of the Ninilchik Tribe testified, “I was born in Anchorage...raised in Ninilchik until third grade and grew up in Kenai. About 1967 I was a member of the Kenaitze Tribe until just about six years ago when I transferred back to Ninilchik. And the reason I point that out is it just shows some of

the ties between the tribes. You know, my grandmother was a Darian from the Kenaitze Tribe. My aunt is a member of the Kenaitze Tribe. I got uncles that are members of the Kenaitze Tribe” (FSB 2006b:97).

In 1941, the Kenai Moose Range was established and only those who had permits could use the cabins previously built by trappers and subsistence fishermen. However, Alaska Natives continued to use their ancestral locations for trapping, hunting, and fishing activities in spite of Federal rules prohibiting use of cabins on refuge lands. Land claim hearings were held in the 1970s attesting to traditional uses of lands and cabins along the upper Kenai River, and fishing between the Kenai River and Tustumena Lake into the mid-1940s (Fall et al. 2004:22).

Homesteaders arrived in the Kenai Peninsula, including the Ninilchik area, in the early 1930s, 1940s, and after World War II and commercial and subsistence fishing became important aspects of their annual cycle. Fall et al. noted, “In freshwater, gillnets and seines were used in the Kenai, Skilak, and Tustumena lakes to harvest lake trout, Arctic grayling, whitefish, and [Dolly Varden] char” (Fall et al. 2004:20–21). Trappers in the upper Kenai River area maintained gillnets in the upper Kenai and caught salmon and trout. Other uses mentioned included taking coho salmon through the ice in the winter and steelhead below Skilak Lake in the late 1940s and early 1950s (Fall et al. 2004:20–21).

There were no legally recognized subsistence fisheries in the freshwaters of the Kenai Peninsula for 50 years. In 1952, gillnets were made illegal in many freshwaters, thus the Kenai Peninsula Dena’ina ceased using gillnets in the fall occupation of their upriver sites. The Stepanka fishery (Skilak Lake), that had been a traditional, long-standing source of salmon for the Dena’ina (Kenaitze) Indians, was closed. As a result of this closure, snagging became the primary harvest method, but snagging was made illegal in 1973. Local residents turned to sport fishing without snagging, and continued to fish the beaches of Cook Inlet with gillnets in the subsistence fishery. In the 1970s, sport fishing had grown and the Kenai had become a favorite spot for sport fishing. The Kenai Peninsula is unique in that rural communities are interspersed among much larger nonrural communities. By the early 1980s the Alaska Board of Fisheries added more restrictions on subsistence and personal use fishing along the Cook Inlet beaches, closing beaches to subsistence gillnetting. By the mid-1990s, only two personal use fisheries remained at the mouth of the Kenai and Kasilof rivers (Fall et al. 2004:22–23; 30).

Regulations relating to areas, seasons, and methods have changed consistently over the past 54 years, and have become more restrictive. The changing regulations have affected Ninilchik’s access to fish resources over time and have encouraged multiple opportunistic approaches towards obtaining subsistence resources. For example, in the case of salmon, as regulations and conditions have changed, residents have adapted their traditional practices to continue to obtain salmon—trade it, buy it, or harvest it in new ways under various regulatory regimes (Georgette 1983:186–187). In 1993, ten years after the above cited-report was written, a State judge ordered the development of educational fisheries for the NTC, the Knik Tribal Council, the Native Village of Eklutna and the Kenaitze Tribe (Loshbaugh 1993:1, 14). These fisheries were established as the result of lawsuit filed by the Kenaitze Tribe. The educational fishery provided another means for residents of Ninilchik to harvest salmon using gillnets. The educational permits, however, were a compromise: “Villagers—who have traditionally focused on early-run king salmon will be catching mostly reds under the proposed permit” (Loshbaugh 1993:14).

Other historic evidence of use of fish by the Dena’ina is provided in a 1975 study of historic sites in the Cook Inlet Region. Nine locations on Federal public lands are described which may have signs of fish camps or caches (Brelsford 1975:38–65, maps). One of these sites at the Russian River campground in the Chugach National Forest was thoroughly investigated and a faunal analysis completed, identifying fish bones used by the Riverine Kachemak and Dena’ina peoples (Corbett 1999:6).

Leman (1993:3–4) makes a number of references to Ninilchik fishing such as a fish trip to Humpy Point south of the Kasilof River outside of present-day Federal public waters, (Leman 1993:218); an article about Ninilchik fisherman making fish traps by hand for river fishing (Leman 1993:374); a poem regarding sharing the first Chinook salmon of the year with everyone in the community (Leman 1993:72); and an article referencing how the Ninilchik people traditionally focused on the early-run Chinook salmon (Leman 1993:71). Reference is also made to Ninilchik residents often walking long distances—one reference to a man walking from Ninilchik to Homer, and another reference to a woman walking 40 miles packing furs from Ninilchik to Kenai (Leman 1993:362). Testimony at the January 2006 Board meeting noted that early settlers would walk long distances to harvest subsistence resources, including fish (FSB 2006a).

In 1994, NTC conducted a survey of NTC households regarding lifetime subsistence harvest areas pre-1994. NTC households harvested nonsalmon throughout the Kenai Peninsula (NTC 1994). NTC interviewed 25 heads of households out of about 100 NTC households whose household heads were NTC members (Brelsford 1994). Respondents marked areas used during their lifetime for harvesting subsistence resources. These maps were combined to create maps combining all of the respondents' lifetime use areas (NTC 1994; Wolfe 2006a). This technique of gathering information on the use area of a community is also used by ADF&G Division of Subsistence (Wolfe 2006a). These lifetime-uses present patterns which are similar to those of other rural communities in Alaska in that the use areas are contiguous to the community and accessible by boat and ground travel rather than aircraft, showing an efficiency and economy of effort. Use areas are not always constant and adapt to new transportation networks, i.e., the construction of roads, which can become a more efficient means for accessing subsistence resources (Wolfe 2006a). Chen (2005:2) noted that Ninilchik residents would travel by dogteam to pursue subsistence activities, including freshwater fishing, in the interior of the Peninsula.

In 2002/2003, Fall et al. (2004) conducted a survey of 100 Ninilchik households selected at random, constituting a 17% sample of the 577 known permanent households in that community. Based on the survey data, Fall and his co-authors at ADF&G Division of Subsistence described the community's pattern of use in terms of percentage of households. Community estimates were made using the findings from the random sample, expanding them to account for that fraction of the community that was not surveyed¹.

The following discussion uses percentages from the expansion of the sample survey data in order for the sample data to represent the whole community. Percentage figures are followed by the estimated number of Ninilchik households each percentage figure represents.

In surveys conducted in 2003 by Fall et al., respondents were asked three questions—but no reference was made regarding what species of fish. The questions were:

- (1) Have you ever fished in Federal public waters?
- (2) Have you fished in the Federal public waters of the Kenai River or Swanson River Areas, in your lifetime?

¹Thus, 1% of the sampled households and represents an estimated 5.77 households (1% of the 577 total households, which equals 5.77). As it pertains to harvest estimates, as an example, if the total number of moose harvested by the surveyed households equals 3, then the estimated community harvest would equal 17.31 (3 x 5.77). This method of expansion is used frequently in analyzing survey results, and is the standard method of ADF&G Division of Subsistence in describing community harvest patterns. This method was also used in Fall et al.'s 1998 research in Ninilchik (Fall et al. 2000).

- (3) If yes to fishing in the Kenai and Swanson River areas, how often did you fish in these waters? Three choices were provided to answer question (3): Frequent use, Intermittent Use, and Infrequent Use.

Federal Public Waters, Responses to Questions 1 and 3: According to the findings in Fall et al. (2006), 28% of Ninilchik's households (an estimated 162 households out of a community total of 577 households), have fished at some point in their lifetime in Federal public waters. Of these estimated 162 households, 62% (100 households) reported frequent use ("about every year") of Federal public waters. These approximately 100 households represented 17% of all Ninilchik households. Sport fishing or ice fishing accounted for all of this use (subsistence fishing was not permitted) (**Table 1**).

Federal Public Waters of Kenai River, Responses to Questions 2 and 3: In response to questions about use of the Federal public waters of the Kenai River, 21% (an estimated 121 households) of the 577 households of the community of Ninilchik said they had fished in these waters at some point in their lifetime. Frequent use "about every year" of Federal public waters was reported by 13% (an estimated 73 households) of the community. Sport fishing or ice fishing accounted for all of this use. Another 4% (an estimated 23 households) of the 577 Ninilchik households reported intermittent use of the Kenai River ("on and off over the years") and 4% (an estimated 23 households) reported infrequent use ("1 or 2 years") (**Table 1**).

Swanson River, Responses to Questions 2 and 3: Thirteen percent (75 households) of the 577 households of the community of Ninilchik reported some use of the Swanson River area. "Frequent use" was reported by 10% (an estimated 56 households) of the 577 households of the community of Ninilchik (Fall et al. 2006:5) (**Table 1**).

Ninilchik's percentages of lifetime use of the Kenai Peninsula Area from Fall's study (Fall et al. 2006) are consistent with other research conducted in Alaska. In 1992 and 1993, ADF&G, Division of Subsistence, analyzed 1988 Tongass Resource Use Cooperative Study (TRUCS) data and made intensity-of-use maps as part of the Tongass Subsistence Studies project. In TRUCS, about 1,450 households in 30 Southeast Alaska communities were interviewed. Respondents were asked to draw lines on maps showing where they hunted, fished, or gathered during their residence in the community; mapping was done by species or resource category. In the 1992 and 1993 analysis, subsistence use was categorized on these maps according to the percentage of households that used an area (by species or resource category) during the time they lived in the study community. The analytic maps provided a measure of intensity of use based on the mapped data provided by respondents. Other research in many Southeast Alaska communities had documented intensity of use. Intensity of use was categorized by less than 1%, 1–5%, 5–10%, 10–15%, 15–20%, 20–25%, and greater than 25%. In general, only a small amount of the total community use area was found to be used by more than 25% of the households interviewed. This research finding was unexpected at the time and may result from a number of characteristics of subsistence harvesting in Southeast Alaska: 1) a good deal of subsistence harvesting is specialized, meaning that not all households hunt seals or deer and not all households catch salmon or halibut, 2) high harvesting households account for a large portion of total fish and wildlife taken for subsistence, and a relatively small number of high harvesting households may account for most of the use of a community's subsistence use area, and 3) cultural factors may determine geographical use, for example, clan members may mainly harvest in their clan areas or family members may be site loyal and not use the whole of a community subsistence use area (Schroeder 2006, pers. comm.).

Table 1. Characteristics of sampled Ninilchik households that have ever fished in Federal waters of the Kenai River or Swanson River areas.

	Kenai River	Swanson River area	Any Federal waters
Number of households in random sample using areas ¹	21	13	28
Total number of Ninilchik households	121	75	162
Percentage of all Ninilchik households ²	21%	13%	28%
Percentage of users with "frequent use" ³	60%	75%	62%
Total number of Ninilchik households	73	56	100
Percentage of all Ninilchik households ²	13%	10%	17%
Percentage of users with "intermittent use" ⁴	20%	8%	15%
Total number of Ninilchik households	24	1	24
Percentage of all Ninilchik households ²	4%	<1%	4%
Percentage of users with "infrequent use" ⁵	20%	17%	23%
Total number of Ninilchik households	24	2	37
Percentage of all Ninilchik households ²	4%	<1%	<6%

Source: Adapted from Fall et al. 2006:6.

¹ Of the 100 households interviewed. This is 17.3% of the study area's population in 2003; weighting factor=5.77.

² Total number of Ninilchik households = 577.

³ Frequent = "about every year."

⁴ Intermittent = "on and off over the years."

⁵ Infrequent = "1 or 2 years."

Contemporary fish harvests

The history summarized above, ethnographic reports, NTC (1994 and 1999) and Fall et al.'s (2006) lifetime use information all indicate that fish have been consistently used by Ninilchik residents from subsistence, personal use, commercial, or sport fisheries. Their use of fish is based on three traditions, the uses of fish by the Dena'ina, the Sugpiaq (Alutiiq), and the early settlers and homesteaders. In a 1980 study of the Cook Inlet subsistence salmon fishery, Braund (1980:79) noted a diversity of users with a core group with a history of significant use in all Cook Inlet communities.

In 2002–03, ADF&G Division of Subsistence conducted a subsistence use study, *The Cook Inlet Customary and Traditional Subsistence Fisheries Assessment* (Fall et al. 2004), which provided a thorough review and assessment of Cook Inlet's subsistence fisheries, both past and present for a number

of communities including Ninilchik. This study documented household use, harvest, harvest locations, and other information pertinent to subsistence fishing in Cook Inlet. As in the 1998 study, this 2002–03 study combined Ninilchik’s uses with Happy Valley CDP uses. The household surveys show that salmon is the primary fish resource. Of the resident fish species, Dolly Varden, rainbow, lake trout, and steelhead trout are harvested by the residents of Ninilchik. Lake trout are only found in Federal public waters. The pattern of use of resident fish species reflects the distribution of the resources in the Cook Inlet Area. A few isolated populations of Arctic char and Dolly Varden occur in lakes in the Swanson River area and Cooper Lake. Burbot also has a limited presence in Juneau Lake (near Cooper Landing) (Nelson 2001, pers. comm.). Ninilchik households did not report any harvest of burbot in 2002 to 2003 (Fall et al. 2004:66–70), nor from 1994 to 1999, as documented by NTC in their study (NTC 1999).

In ADF&G’s 2002–03 study, in all of Cook Inlet 21% of Ninilchik households fished for resident species in freshwater (an estimated 2,368 pounds). This harvest was comprised of Dolly Varden (897 pounds), lake trout (444 pounds), rainbow trout (1,101 pounds), and pike (17 pounds) (pike were introduced illegally in the early 1970s in the Soldotna Creek drainage [Nelson 2005, pers. comm.]). In the one year of study, none of Ninilchik’s residents who were surveyed harvested Arctic grayling (also introduced to the Kenai Peninsula), whitefish, steelhead, or burbot (Fall et al. 2004:66–70; **Table 2**). NTC also found no harvest of whitefish, steelhead, or burbot from 1994 to 1999, and an average Arctic grayling harvest per household of only 6 pounds (NTC 1999).

The Southcentral Council met in September 2008 to make their recommendation on Proposal FP09-07. During the discussion, staff prompted Council members to list the species of the most importance (SCRAC 2008) and consequently the Council recommended modifying the proposed regulation by making the customary and traditional use determination species specific by replacing “all fish” with Dolly Varden, Arctic char, lake trout, rainbow and steelhead trout. Other fish that may occur in the Kenai River Area are Arctic grayling and burbot (as well as pike, which were illegally introduced). It should be noted that in the 1994 NTC study conducted of lifetime uses, Ninilchik residents reported harvesting in their lifetimes an annual average of 6 pounds of Arctic grayling, 18 pounds of burbot, and 81 pounds of pike (Table 3). Arctic grayling and pike were harvested in Units 13A, 14A, and Units 15A, 15B, and 15C and burbot was harvested in Units 15B and 15C (Table 3). It is unknown if any of these harvests were on Federal public lands. Under current Federal regulations, there is no Federal open season for Arctic grayling and burbot. Pike can be harvested with no limits under State regulations.

The historic pattern of use of fish resources continues today by Ninilchik residents. An ADF&G study documenting resource uses in 1998 in Ninilchik (and Happy Valley CDP) found that 96% of households harvested subsistence resources, with a per capita harvest of 164 pounds (Fall et al. 2000:137). Resident fish species each made up anywhere from 2% to 30% of the per capita pounds of fish harvested. The highest harvest was Dolly Varden (estimated at 665 pounds). Lake trout were also harvested (estimated at 33 pounds) (ADF&G 2001). Marine fish, primarily halibut, provided the remainder of the fish harvests (Fall et al. 2004:44–45). Georgette (1983:185) noted that Ninilchik residents have found that competing with crowds of sport fishermen has made harvesting fish difficult.

Fall et al. (2004) compared the estimated harvests of all fish, as measured in pounds per capita to other recent years for which survey data were available. Estimated harvests by Ninilchik residents in 2002/2003 were similar to 1998, the other most recent study year (Ninilchik: 80.8 pounds in 1998, 81.7 pounds in 2002/2003) (Fall et al. 2004:54). Although there are limitations to using single years’ harvest data, these comparisons clearly indicate that the community of Ninilchik has a pattern of use of harvesting fish.

Table 2. Estimated Harvest and Use of Fish, Nimilchik, 2002.

Resource Name	Percentage of Households				Pounds Harvested		Amount Harvested		95% Conf Limit (+/-)	
	Use	Att	Harv	Recv	Give	Total	Mean HH	Percapita	Total	Mean HH
All Resources	96.0	75.0	73.0	76.0	58.0	132,562	229.7	81.8	132,562 lbs	229.7
Fish	96.0	75.0	73.0	76.0	58.0	132,562	229.7	81.8	132,562 lbs	229.7
Salmon	92.0	72.0	69.0	58.0	46.0	75,958	131.6	46.8	16,589 ea.	28.8
Chum Salmon	7.0	6.0	6.0	1.0	1.0	3,677	6.4	2.3	681 ea.	1.2
Coho Salmon	55.0	44.0	41.0	25.0	18.0	18,062	31.3	11.1	3,474 ea.	6.0
Chinook Salmon	59.0	50.0	38.0	32.0	19.0	13,594	23.6	8.4	877 ea.	1.5
Pink Salmon	20.0	12.0	12.0	10.0	6.0	7,118	12.3	4.4	2,966 ea.	5.1
Sockeye Salmon	80.0	56.0	54.0	38.0	35.0	33,507	58.1	20.7	8,592 ea.	14.9
Non-Salmon Fish	87.0	64.0	60.0	58.0	43.0	56,604	98.1	34.9	56,604 lbs	98.1
Herring	2.0	1.0	1.0	1.0	0.0	519	0.9	0.3	87 gal	0.2
Herring Roe	1.0	0.0	0.0	1.0	0.0	0	0.0	0.0	0 gal	0.0
Herring Sac Roe	1.0	0.0	0.0	1.0	0.0	0	0.0	0.0	0 gal	0.0
Herring Spawn on Kelp	0.0	0.0	0.0	0.0	0.0	0	0.0	0.0	0 gal	0.0
Smelt	17.0	5.0	5.0	12.0	2.0	769	1.3	0.5	237 gal	0.4
Eulachon (hooligan, candlefish)	17.0	5.0	5.0	12.0	2.0	769	1.3	0.5	237 gal	0.4
Cod	11.0	10.0	9.0	3.0	2.0	2,561	4.4	1.6	854 ea.	1.5
Pacific Cod (gray)	10.0	9.0	8.0	3.0	2.0	2,530	4.4	1.6	790 ea.	1.4
Pacific Tom Cod	3.0	4.0	3.0	0.0	0.0	32	0.1	0.0	63 ea.	0.1
Walleye Pollock (whiting)	1.0	0.0	0.0	1.0	0.0	0	0.0	0.0	0 ea.	0.0
Flounder	1.0	1.0	1.0	0.0	0.0	692	1.2	0.4	231 ea.	0.4
Starry Flounder	1.0	1.0	1.0	0.0	0.0	692	1.2	0.4	231 ea.	0.4
Greenling	8.0	8.0	7.0	4.0	0.0	842	1.5	0.5	237 ea.	0.4
Lingcod	6.0	5.0	5.0	2.0	0.0	808	1.4	0.5	202 ea.	0.4
Unknown Greenling	2.0	3.0	2.0	2.0	0.0	35	0.1	0.0	35 ea.	0.1
Halibut	84.0	56.0	53.0	50.0	42.0	46,766	81.1	28.8	46,766 lbs	81.1
Rockfish	12.0	8.0	8.0	4.0	2.0	1,944	3.4	1.2	998 ea.	1.7
Black Rockfish	8.0	7.0	7.0	1.0	2.0	1,229	2.1	0.8	819 ea.	1.4
Red Rockfish	6.0	3.0	3.0	3.0	1.0	715	1.2	0.4	179 ea.	0.3
Unknown Rockfish	0.0	0.0	0.0	0.0	0.0	0	0.0	0.0	0 ea.	0.0
Sablefish (black cod)	2.0	1.0	1.0	1.0	0.0	89	0.2	0.1	29 ea.	0.1
Shark	1.0	1.0	1.0	0.0	0.0	52	0.1	0.0	6 ea.	0.0
Unknown Shark	1.0	1.0	1.0	0.0	0.0	52	0.1	0.0	6 ea.	0.0
Burbot	0.0	0.0	0.0	0.0	0.0	0	0.0	0.0	0 ea.	0.0
Char	16.0	19.0	15.0	3.0	5.0	1,341	2.3	0.8	958 ea.	1.7
Dolly Varden	13.0	15.0	12.0	2.0	4.0	897	1.6	0.6	640 ea.	1.1
Lake Trout	7.0	9.0	6.0	2.0	3.0	444	0.8	0.3	317 ea.	0.6
Grayling	0.0	0.0	0.0	0.0	0.0	0	0.0	0.0	0 ea.	0.0
Pike	1.0	1.0	1.0	0.0	0.0	17	0.0	0.0	6 ea.	0.0
Unknown Pike	1.0	1.0	1.0	0.0	0.0	17	0.0	0.0	6 ea.	0.0
Trout	9.0	8.0	6.0	4.0	2.0	1,010	1.8	0.6	721 ea.	1.3
Rainbow Trout	8.0	8.0	6.0	3.0	2.0	1,010	1.8	0.6	721 ea.	1.3
Steelhead	1.0	0.0	0.0	1.0	0.0	0	0.0	0.0	0 ea.	0.0
Whitefish	2.0	0.0	0.0	2.0	0.0	0	0.0	0.0	0 ea.	0.0
Unknown Whitefish	2.0	0.0	0.0	2.0	0.0	0	0.0	0.0	0 ea.	0.0

SOURCE: Fall et al. 2004.

In 1999, NTC conducted another survey to assess Ninilchik's harvests and use areas from 1994 to 1999. Rather than designating the use by drainage, unit and subunits were used. Harvest use patterns including location of harvests, species harvested, and amounts harvested have changed significantly over the lifetime of Ninilchik residents. NTC's 1994 study of lifetime uses indicated large use areas for nonsalmon fish species throughout the entire Kenai Peninsula, however, resident species were not distinguished from other nonsalmon. In the NTC study conducted of uses from 1994 to 1999, respondents were harvesting significantly less fish and their use area had narrowed to predominantly Unit 15C (which predominantly focuses on Kenai Refuge lands in the Kasilof River drainage). For example, the average number of Dolly Varden harvested per household dropped from 22 in the lifetime use study to 12 in the 1994 to 1999 study (Table 3).

In 2002, the Board adopted subsistence fishing regulations for the Cook Inlet Area that mirrored sport fishing regulations. Permits were issued to Ninilchik residents beginning in 2007 and 30 Ninilchik residents were issued Kenai River salmon permits. In the Kenai River Area, Ninilchik only has a positive customary and traditional use determination for salmon, thus only salmon permits were issued. The remainder of the permits issued to Ninilchik residents were for the Kasilof River drainage. Five permits were issued in the 2006/2007 Tustemena winter ice fishery. Reported harvests were 20 lake trout and 6

Table 3. Ninilchik Tribal Council households' harvests of resident species of fish: lifetime (pre-1994) and 1994 to 1999^{1,2} (NTC 2006).

Species	Study Period	Percentage of Households				Resident Species Harvested	
		Using (%)	Trying (%)	Receiving (%)	Sharing (%)	Av. Lbs. Harvest Per HH Per Year	Unit Harvested
Grayling	Lifetime to 1994	24	20	8	12	6	13A, 14A, 15A, B, & C
	1994–1999	10	14	0	5	11	15B & C
Burbot	Lifetime to 1994	12	8	12	12	18	15B & C
	1994–1999	0	0	0	0	0	—
Pike	Lifetime to 1994	20	16	20	16	81	13A, 14A, 15A, B, & C
	1994–1999	0	0	0	0	0	—
Dolly Varden	Lifetime to 1994	52	48	44	44	31	7,8,13A, 14A C, 15 B, & C
	1994–1999	43	48	19	14	17	15C
Lake Trout	Lifetime to 1994	52	44	40	32	28	7,8,13A, 14A & C, 15A, B, & C
	1994–1999	10	14	0	0	8	15C
Cutthroat Trout	Lifetime to 1994	4	4	4	4	63	14A & C, 15A, B, & C
	1994–1999	5	5	5	4	14	15C
Rainbow Trout	Lifetime to 1994	64	60	32	48	27	7,13A, 14A, B & C, 15A, B, & C
	1994–1999	38	43	19	10	20	15C

¹ The methods used in this study were consistent with the standard methods used by the Alaska Department of Fish and Game, Division of Subsistence for mapping use areas (Wolfe 2006a and 2006b).

² These results cannot be expanded to the entire community because the sample was nonrandom.

Dolly Varden (Palmer 2008, pers. comm.). It is unknown if the majority of subsistence users in Ninilchik were aware that beginning in 2002 they could harvest fish under Federal subsistence regulations. Since the Federal regulations mirrored sport fishing regulations until 2008 in seasons, methods and means, and harvest limits, there were few advantages in having a Federal permit prior to 2008.

Seasons of use

Since statehood, salmon season openings have been regulated (see Proposal FP06-09 staff analysis, Appendix B, Tables 2–5 for the regulatory history of the Cook Inlet Area affecting subsistence fisheries).

For resident fish, harvests occurred throughout the year according to availability and associated activities, with some species targeted for ice fishing activities in the winter. Three harvest patterns of rainbow trout and Dolly Varden occur: the harvest in the winter months through the ice with rod and reel, the harvest in the summer months in local creeks and lakes, and the occasional harvest such as rod and reel salmon fishing associated with moose hunting and other activities. The preference is to take Dolly Varden and rainbow trout in June and September (Fall et al. 2004:52; NTC 2006).

Methods and means

Subsistence fishing is typically characterized by the use of efficient gear, such as set gillnets, operated by family groups in traditional use areas accessible to families (Wolfe 2006b). Traditional methods used to harvest freshwater fish were with bone fishhooks, later replaced by metal hooks and nets set in ponds and lakes, often under the ice (Townsend 1981:626). The traditional Sugpiaq (Alutiiq) methods included “traps, weirs, spears, hooks, and hook and line, and all were used in streams” (ADF&G 1992a:18). Russell (1994:14) notes that Ninilchik residents used dry spruce as poles in fish traps.

In the historic period, fish were taken in the spring with basket traps or in the winter through the ice with hook and line. Ninilchik residents also remember using fish spears made from straight pieces of wood to harvest fish upstream—but not at the mouth of the stream (Russell 1994:21). Rod and reel and dip net were also used (Fall et al. 2000 and 2004).

Rod and reel and hook and line ice fishing are the current methods used (and the only methods allowed) for harvesting resident fish. Lake trout and rainbow trout are harvested by ice fishing; all of the resident species are harvested by rod and reel (Fall et al. 2004:108).

Areas of use

Regulatory actions in 1952 prohibited subsistence fishing except by rod and reel in waters of the Kenai Refuge and the Chugach National Forest. Until the Federal subsistence fishery was established, Ninilchik residents have only been able to harvest fish through freshwater sport fisheries, in marine waters subsistence net fisheries for late coho salmon until 1978, homepack from commercial harvests, personal use fishing with dip nets at the mouths of some rivers since 1981 and with gillnets since 1985, and educational fisheries since 1993. The rapid growth of the Kenai Peninsula, increased infrastructure, influx of Euro-Americans, construction of roads, as well as regulatory restrictions on subsistence uses have had a profound effect on the subsistence use patterns of Kenai Peninsula communities.

In the lifetimes of Ninilchik residents, much of the population on the Kenai Peninsula has changed from a large percentage of indigenous people, homesteaders, and commercial fishers, to a population dominated by newcomers who have full-time jobs and are interested in recreational fishing and hunting. Not surprisingly, hunting and fishing subsistence use patterns have changed as well. Long-term Ninilchik

residents and their families now live in permanent homes and no longer move seasonally to hunt and fish. Their fish harvests are now generally concentrated close to their homes, particularly when fish are abundant.

Research conducted by Fall et al. (2004) documented fish harvest locations in 2002/2003 for Ninilchik (and other communities not under consideration in this analysis), including specific information regarding fish harvests from Federal public waters (Fall et al. 2004:58–59; 113). Fall et al. (2000) also documented fish harvest areas in an earlier 1998 study, but not whether or not the harvest occurred in Federal public waters. It should be noted that these two years of data provided similar results, and are likely indicative of recent use patterns of the studied communities (Fall et al. 2004). This information supplements historical information and public testimony. NTC (1999) also provided maps of each of Ninilchik’s respondent’s fish harvest areas, but these areas were not broken down by species.

Harvest of resident fish species by Ninilchik residents generally occurs in the lakes, creeks, and rivers near the community, unless associated with hunting or other harvesting activities. This pattern of use where multiple activities occur at the same time—berry picking, fishing for Dolly Varden and rainbow trout while hunting—is common among subsistence users in Alaska. By their very nature, subsistence users are opportunistic and harvest what is available, unlike sport users who generally target single resources. In addition, subsistence fishing is opportunistic and fishing is not limited to a specific species. If a Ninilchik resident is fishing for salmon (for which they have a positive customary and traditional use determination) either by net or any other method, and a resident species such as rainbow trout is harvested, it will be harvested. In all waters in the Kenai River Area where salmon are available, resident species of fish are also available, thus it is quite likely that an incidental take of a resident species will occur when fishing for salmon.

Fall et al. (2000:121) conducted a survey in 1998 in Ninilchik that documented general use areas for fish harvests. For the 1998 study, surveys were conducted with 100 households selected at random, constituting a 19% sample of the 527 known permanent households in that community. In 1998, an estimated 2% of Ninilchik households (an estimated 11 households) harvested salmon in wildlife Unit 15A on the Kenai Refuge, 3% (an estimated 16 households) in Unit 15B on the Kenai Refuge, and 2% (an estimated 11 households) in Unit 7 on the Kenai Refuge and the Chugach National Forest (Fall et al. 2000). These findings were not specific to drainages, but rather specific to wildlife management units. Findings of Fall et al.’s study (2004) done in Ninilchik 2002/2003 were consistent with the 1998 study findings. In the more recent study, 100 randomly selected households represented a 17% sample of the total community of 577 households (Fall et al. 2004:11). These 100 surveys provided the data from which community estimates were made. In 2002/2003, 4% (an estimated 23 households) of Ninilchik households harvested sockeye salmon in the Russian River. An estimated 1% (an estimated 6 households) harvested rainbow trout and lake trout in Kenai Lake or Kenai Mountain streams on the Kenai Refuge (Fall et al. 2004:113). These were the only documented uses of fishery resources by the community of Ninilchik in the Kenai River Area in 2002/2003 (**Table 4** [Fall et al. 2004]).

The NTC compared the results of two studies they conducted, one in 1994 of lifetime use areas and a follow-up study in 1999 of uses between 1994 and 1999. NTC’s analysis found that during their lifetimes, NTC residents harvested Dolly Varden, lake trout and rainbow trout were harvested in Units 7, 8, 13A, 14A, 15A, 15B, and 15C, but from 1994 to 1999 these species were only harvested in Unit 15C. The use and average pounds harvested dropped significantly (see **Table 3**). There are many reasons why the per household harvest of resident fish may have decreased, including the prohibition of subsistence fishing in 1952, restrictions to the use of traditional, efficient, subsistence fishing gear types, increasing human population, influx of sport fishermen, increasing participation in a cash economy, and commercial

Table 4. Locations Used to Harvest Fish, Ninilchik, 2002/2003

Area Fished	Percentage of Households							
	Chinook	Sockeye	Coho	Chum	Pink	Dolly Varden	Rainbow Trout	Hooligan
<u>Federal Public Lands and Waters:</u>								
Kenai Lake and Kenai Lake Streams	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	1.00%	1.00%
Kenai Mountain Streams	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	1.00%	0.00%
Russian River	0.00%	4.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%
<u>Other Lands and Waters:</u>								
Anchor River, Stariski Creek	4.00%	0.00%	5.00%	0.00%	1.00%	1.00%	0.00%	0.00%
Cook Inlet, Anchor Point	4.00%	0.00%	1.00%	0.00%	1.00%	0.00%	0.00%	0.00%
Cook Inlet, Coho	0.00%	4.00%	1.00%	0.00%	0.00%	0.00%	0.00%	0.00%
Cook Inlet, Deep Creek	12.00%	4.00%	6.00%	0.00%	2.00%	0.00%	0.00%	0.00%
Cook Inlet, Kenai	3.00%	5.00%	0.00%	0.00%	1.00%	0.00%	0.00%	1.00%
Cook Inlet, West	1.00%	1.00%	1.00%	0.00%	1.00%	0.00%	0.00%	0.00%
Gulf of Alaska	0.00%	0.00%	4.00%	0.00%	1.00%	1.00%	0.00%	0.00%
Kachemak Bay	9.00%	1.00%	7.00%	1.00%	1.00%	1.00%	0.00%	0.00%
Kasilof River, Crooked Creek	4.00%	8.00%	0.00%	0.00%	0.00%	1.00%	4.00%	0.00%
Lower Kenai River	4.00%	22.00%	2.00%	0.00%	0.00%	1.00%	0.00%	3.00%
Ninilchik River, Deep Creek	19.00%	8.00%	20.00%	1.00%	2.00%	8.00%	1.00%	0.00%
Resurrection Bay	0.00%	0.00%	4.00%	0.00%	0.00%	0.00%	0.00%	0.00%
Other Alaska	1.00%	2.00%	2.00%	0.00%	1.00%	0.00%	0.00%	0.00%
Missing	7.00%	1.00%	2.00%	0.00%	0.00%	3.00%	2.00%	1.00%

SOURCE: Fall et al. 2004.

fishing. ADF&G, Division of Subsistence, conducted studies in the 1980s of Ninilchik families, which documented the efforts made by families to procure fish in the absence of stable subsistence fisheries and their difficulties harvesting adequate supplies of fish. The case studies showed shifting harvest techniques from year to year, responding to changing restrictive regulations while at the same time competing with thousands of recreational visitors to the Kenai Peninsula (Georgette 1983).

The 2002/2003 survey also asked respondents to name places that might be a “potential site for Federal subsistence fisheries.” Ninilchik households said they would like to see a Federal subsistence fishery in the following locations: 8% (an estimated 46 households) in the Kenai Refuge, 4% (an estimated 24 households) in the Kenai Fjords National Park (which is closed to subsistence fishing), 4% (24 households) in the upper Kenai River, 3% (an estimated 17 households) in Skilak Lake, 2% (an estimated 12 households) in the Chugach National Forest, 2% (12 households) in Kenai Lake, 2% (12 households) in the lower/middle Kenai River, 2% (an estimated 12 households) in the Swanson Lakes, and 1% (an estimated 6 households) each in Johnson Lake and the Russian River (Fall et al. 2004:140).

As noted, NTC conducted research of select NTC members’ subsistence uses of fish and wildlife in 1999. NTC conducted face-to-face household surveys in 1999 to collect information on wildlife use patterns of 20 randomly selected Ninilchik tribal member households out of an estimated 61 households². Respondents were asked to draw areas used for subsistence harvests for species such as Chinook salmon, other salmon and nonsalmon fish during the last five years (1995 through 1999). It should be noted that Dr. Robert Wolfe has documented that the methods used by NTC for mapping subsistence uses were consistent with ADF&G subsistence research (Wolfe 2006a, b). NTC’s research showed that the Upper Kenai River/Kenai Lakes were used by 28% of Ninilchik residents to harvest nonsalmon fish and that Skilak Lake/Other were used by 16% to harvest nonsalmon fish (Dyrdahl 2005).

Based on information from NTC presented at the Southcentral Council meeting in October 2005, respondents of their survey harvested char and trout from Federal public waters, but specific drainages and levels of use were not provided (SCRAC 2005). Public testimony at the Southcentral Council meeting noted that fishing occurred in Skilak and Tustumena lakes and the Swanson River lake system. Trout was the only fish specifically mentioned in the testimony (SCRAC 2005). BIA staff met with NTC in September 2005, to see if additional information could be elicited from the survey regarding specific locations of fish harvests from Federal public waters on the Kenai Peninsula. Fish harvest locations in Russian, Summit and Hidden lakes, Swanson and Kenai rivers in the Kenai Refuge, and trout fishing through the ice were noted (Chen 2005).

Fall et al.’s reports in 2000 and 2004 and NTC 1999 each surveyed the harvests from one year and as such have limitations in determining a consistent pattern of use. However, there was consistency between the amounts reported harvested in Fall et al.’s 2000 and 2004 studies. Testimony presented at the October 2006 Southcentral Council meeting in Homer noted that the Kenai River was preferred over the Kasilof River prior to the prohibition of subsistence fishing in 1952 because the Kenai River is slower moving than the Kasilof River and therefore easier to pole up (SCRAC 2006). Fall et al.’s research, NTC’s research, and public testimony (SCRAC 2005, 2006 and FSB 2006a,b), combined with the lifetime use data from Fall et al. 2006 all indicate some level of use by Ninilchik residents for harvesting fish in the Kenai River Area. The data indicate that the Kenai River Area has been used by Ninilchik residents both in the past and currently.

²The estimate of NTC households with NTC members is based on the number of households with an Alaska Native member cited in the U.S. Census in 2000. The census was conducted the year after the NTC research and could be slightly greater or less.

While Ninilchik's harvests are lower in the Kenai River Area than in other areas closer to their community, it has been noted (in a legal opinion stated in a letter to the State of Alaska from the Secretary of the Department of the Interior) that there are no "unimportant" subsistence uses (USDOI 1986: 6–7):

Section 803 [of ANILCA] defines 'subsistence uses' to mean 'customary and traditional uses ... of wild, renewable resources,' and Section 804 requires that 'nonwasteful subsistence uses' be given a preference over other uses. The plain meaning of these provisions dictates that all 'subsistence uses' as defined in Section 803 qualify for the Section 804 subsistence preference. To the extent that a particular population is relatively unimportant for subsistence purposes, this should be reflected in relatively low customary and traditional use of the population. Yet, however low the customary and traditional use might be (i.e., however 'unimportant' it might be), Section 804 requires that the opportunity to make the use be given an absolute priority over nonsubsistence uses.

Handling, preparing, preserving, and storing

Traditional fisheries provide the opportunity for the efficient harvest of a sizeable volume of fish as well as small, incidental harvests while traveling that may be cut, dried, and smoked by the family (Wolfe 2006b). In the Kenai Peninsula, large quantities of fish harvested are salmon. Traditional methods of processing and handling fish included drying, smoking, fermenting, and storing in oil. All fish also may be either broiled, baked, broiled, or roasted (Osgood 1937:42). The pattern of harvesting resident fish species also is quite different from the pattern of harvesting salmon. Resident species such as trout are usually harvested in much smaller quantities, partially because resident species of fish often do not preserve as well as salmon. The harvest of resident fish species in the Kenai River Area are more likely to occur when associated with hunting or other harvesting activities, such as berry picking. This pattern of use where multiple activities occur—berry picking, fishing for Dolly Varden and rainbow trout while hunting—is common among subsistence users. Women gathered driftwood from the beach for smoking fish (Russell 1994:13). Ninilchik residents use rotten spruce wood to smoke fish because rotten wood loses the strong flavor found in living trees. Drift cottonwood also is commonly used to smoke fish because cottonwood found on the beach is "clean," without sap, and contains salt, making it a preferred wood for smoking (Russell 1994:14–18). Osgood (1937:42) also noted that cottonwood is used at night because it requires less attention to keep burning. Mountain alder also is used for smoking fish (Russell 1994:14–18) and is sometimes preferred because it has a nice flavor (Osgood 1937:42). Spruce poles with their bark removed are used as racks for drying fish (Russell 1994:14–18). Other uses described are salting, pickling, canning, freezing, and eating the fish fresh (Stanek 1980:11).

Some resident species of fish do not dry or preserve as well as salmon (Williams, 2008, pers. comm.) and are more likely to be eaten shortly after harvesting or frozen. Some Dolly Varden found in lakes have a low fat content and the fat tends to spoil easily, regardless of how the fish is processed (BBNA and ADF&G 1996:47), thus making it more desirable as a fish that is eaten fresh.

Handing down of knowledge of fishing

Subsistence users in Alaska pass information from generation to generation about how to subsistence hunt and fish. Ninilchik is no exception. Testimony at Council and Board meetings provided information regarding how elders teach the young people how to fish. Because of the prohibitions against subsistence fishing established in 1952, traditional practices have been more difficult to pass on from generation to generation. The Alaska Board of Fisheries, in compliance with an Alaska Superior Court order, established educational fisheries in the communities of Kenai in 1989 and in Ninilchik in 1993 (Fall et al. 2004:30). This permit allows Alaska residents accompanied by an NTC member to participate in this

fishery (Brannian and Fox 1996:10). This educational fishery allows participation of some subsistence users in the Chinook and coho salmon harvests (Nelson et al. 1999:160). One purpose of the educational fisheries is to allow the handing down of traditional knowledge, as well as a way for obtaining subsistence fish.

Sharing

In a broad study of subsistence uses in the Kenai Peninsula, Reed (1980:3) notes that subsistence fish are used to satisfy social obligations and gifts of fish are made to family, friends, and neighbors. Data collected by ADF&G (Fall et al. 2000) indicates that 55% received nonsalmon and 49% gave nonsalmon away. Subsistence foods harvested within a household are commonly shared with other households in the extended family, according to local customs and traditions. Alaska Native groups like the NTC expect parents to provide subsistence resources to the young children. In turn, when the children are old enough, they are expected to work with parents harvesting and processing subsistence foods. Children grow up, marry, and continue these relationships with their families. As the parents age, the children then care for them and share the resources they harvest. Subsistence roles and social responsibilities evolve over time. The traditional system of harvesting and then distributing subsistence resources helps support the network of families that make up the larger community. Networks of giving and receiving bind the family members together as well as bind the larger community (Wolfe 2006b:8).

Distribution and sharing of fish and wildlife resources among households occurs often in Ninilchik, though not in large quantities because of the scarcity of resources (especially large mammals). Georgette (1983:186) noted that several households surveyed in her research said they share subsistence resources with friends or neighbors who do not have time or equipment to harvest it themselves. Fish are shared more frequently than large mammals because of the scarcity of large mammals, which are only shared among close relatives. Subsistence resources are shared with others if they are in need.

Reliance upon a wide diversity of fish and wildlife resources

Ninilchik residents rely on a wide diversity of fish and wildlife resources. The average number of wild resources used by Ninilchik households was 8.6 in 1998. This is greater than in Kenai (6.1 in 1991 and 7.1 in 1993) and Cooper Landing (8.3). These uses are reflective of a heterogeneous community that is comprised of long-term residents and newcomers and a community that does not harvest marine mammals. In 1998, Ninilchik residents harvested 164 pounds per person of subsistence wild resources for home use (Fall et al. 2000:242–245).

Effect of the Proposal

A positive customary and traditional use determination for the residents of Ninilchik for all fish in the Federal public waters of the Kenai River Area would provide them with a subsistence priority for harvesting resident fish species. Ninilchik residents already have a positive customary and traditional use determination for salmon in the Kenai River Area. A positive customary and traditional use determination for all fish in the Kenai River Area would allow Ninilchik residents to harvest resident species under Federal subsistence regulations as well as retain resident species when harvested incidentally while salmon fishing. This would provide Ninilchik with the same customary and traditional use determination—all fish—as the communities of Hope and Cooper Landing.

Effects on nonsubsistence users and conservation concerns are addressed through the implementation of seasons, harvest limits, and methods and means of the harvest and are not part of the consideration in making customary and traditional use determinations. However, effects on nonsubsistence users are not

expected to be significant because recent studies (Fall et al. 2000 and 2004 and NTC 1999) have indicated low levels of resident fish species harvests and use in the Kenai River Area by Ninilchik residents.

The Southcentral Council's recommended modification to the proposed regulation for a customary and traditional use determination for resident species of fish for the community of Ninilchik would exclude burbot, Arctic grayling, and pike. The recommendation is not anticipated to have any effect on the community of Ninilchik's use of resident species in the Kenai River Area. There is no open Federal season for burbot and Arctic grayling, and no Federal regulations for pike. There are no limits for harvesting pike under State regulations. Adopting the Southcentral Council recommendation would result in a regulation broken out by species for Ninilchik and for all fish for Hope and Cooper Landing, although the net effect would be the same for all communities.

OSM CONCLUSION

Support Proposal FP09-07.

Justification

Until 1952, freshwater streams in the Kenai Peninsula were open to subsistence fishing. In 1952, all streams and lakes of the Kenai Peninsula were closed to subsistence fishing under Territory of Alaska regulations. Only rod and reel or hook or line were allowed for "personal use." From 1952 until 2002 and from 2006 until the present, Ninilchik residents were not allowed to subsistence fish for resident fish species in the Kenai River Area. Because such a prohibition constitutes an interruption beyond the control of Ninilchik residents, the Board necessarily makes its decision on the best available information concerning historical patterns of use prior to the imposition of the prohibition or contemporary patterns of use under existing regulations. Residents of Ninilchik have consistently harvested all fish on the Kenai Peninsula since the community was settled in the mid-1800s. Information regarding Ninilchik's harvests of resident fish species in the Kenai River Area was provided by Fall et al. (2000, 2004, and 2006), NTC (1994 and 1999), Chen (2005, pers. comm.), Wolfe (2006a and b) and during public testimony at Southcentral Council (SCRAC 2005, 2006, and 2007) and Board (FSB 2006a and b, and 2007a, b and c) meetings.

Information provided by Fall et al. (2006) and NTC (1994 and Wolfe 2006a and 2006b) documented the lifetime uses of fish species by Ninilchik residents of the Kenai River Area. Fall et al. (2006) found that 28% of Ninilchik households had fished for either salmon or resident fish species in the Federal public waters of the Kenai River or the Swanson River areas in their lifetime (17% frequently, 4% intermittently, and less than 6% infrequently). Kenai River use has decreased in recent years due to changes in regulations, competition with other users, and population changes. Fall et al. (2000 and 2004) documented Ninilchik residents' subsistence harvest and use of resident fish in the Kenai River Area. Fall et al. (2004) reported that less than 1% of households harvested rainbow trout and lake trout in Kenai Lake or Kenai Mountain streams on the Kenai Refuge. Fall et al.'s research in 1998 and 2002-03, indicates that while harvests were low, there was a consistent pattern of use by Ninilchik residents in the Kenai River Area for harvesting resident fish. Additionally, while Ninilchik's uses of the Kenai River Area were not substantial during the study years, there are no "unimportant" subsistence uses in ANILCA (USDOI 1986: 6-7).

The opportunistic nature and associated values of subsistence hunting and fishing is that it does not limit harvest to a specific species—specifically, if a Ninilchik resident were fishing in the Kenai River Area for salmon (for which they have a positive customary and traditional use determination), and a rainbow trout is harvested instead, it is the nature of the subsistence user to use what is harvested. This is the pattern throughout Alaska of subsistence hunting and fishing.

The pattern of harvesting resident fish species also is distinct from the pattern of harvesting salmon. Resident species such as trout are usually harvested in smaller quantities, partially because resident species of fish often do not preserve as well as salmon. The harvest of resident fish species in the Kenai River Area is likely to occur when associated with hunting or other harvesting activities, such as berry picking. This pattern of use where multiple activities occur—berry picking, fishing for Dolly Varden and rainbow trout while hunting—is common among subsistence users.

Based on the available history of the pattern of Ninilchik's use of resident fish species in the Kenai River Area, the opportunistic nature of subsistence uses, and the demonstrated history of fishing activities by Ninilchik residents, it is reasonable to conclude that Ninilchik residents have customarily and traditionally used resident fish species in the Kenai River Area. Thus, there is a reasonable basis for a positive customary and traditional use determination for the community of Ninilchik in the Kenai River Area for all fish, with no distinction between salmon and resident fish species.

The Southcentral Council's recommended modification to the proposed regulation for a customary and traditional use determination for resident species of fish for the community of Ninilchik would exclude burbot, Arctic grayling, and pike. The recommendation is not anticipated to have any effect on the community of Ninilchik's use of resident species in the Kenai River Area. There is no open Federal season for burbot and Arctic grayling, and no Federal regulations for pike. There are no limits for harvesting pike under State regulations. Adopting the Southcentral Council recommendation would result in a regulation broken out by species for Ninilchik and for all fish for Hope and Cooper Landing, although the net effect would be the same for all communities.

Finally, conservation concerns are not part of the decision process for making customary and traditional use determinations. Such concerns are properly addressed through the implementation of seasons, harvest limits, and methods and means of the harvest.

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INTERAGENCY STAFF COMMITTEE COMMENTS

FP09-07

The Interagency Staff Committee (ISC) found the staff analysis for Proposal FP09-07 to be a thorough and accurate evaluation of the proposal.

The majority of the ISC noted that a holistic application of the eight factors demonstrates that residents of Ninilchik have a customary and traditional pattern of use of resident fish in the Federal public waters of the Kenai Peninsula District, while a minority of the ISC noted that there is not a pattern of use by the community of Ninilchik for resident fish species in these same waters. The majority also believe that there is insufficient information to distinguish between individual species and that use of a species cutoff-date prior to 1952 could be detrimental to Federally qualified subsistence users. In reaching its conclusion, the minority believes a customary and traditional use determination for residents of Ninilchik for any resident fish species in this area is not supported by substantial evidence.

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Alaska Department of Fish and Game
Comments to the Federal Subsistence Board

FP09-07 Ninilchik Customary and Traditional Use Determination for Resident Species in the Kenai River Area

Introduction: Proposal FP09-07 requests that recent customary and traditional use (C&T) findings by the Federal Subsistence Board (Federal Board) for the communities of Ninilchik and Happy Valley be changed to allow those residents to harvest resident fish stocks under federal subsistence regulations from federal lands within and north of the Kenai River drainage (“Kenai River area”). Proposal FP09-07 is identical in intent to the portion of Proposal FP06-09 which the Federal Board rejected on September 13, 2007, based on insufficient evidence to support a determination of customary and traditional use of resident species within the Kenai River area by residents of Ninilchik and Happy Valley after a lengthy public process and intense examination lasting over a year. The federal staff analysis of this proposal mirrors its analysis of that portion of the previous proposal that the Federal Board rejected. The proposal and federal staff provide no new or substantial evidence of Ninilchik or Happy Valley customary and traditional taking of discrete resident fish stocks of the upper Kenai River area within federal public lands.

Background: Application of the September 23, 2008, Ninth Circuit Court opinion in *State of Alaska v. Federal Subsistence Board*, 544 F.3d 1089, reinforces the correctness of the Federal Board’s prior C&T determination regarding nonuse of the resident fish stocks within federal lands in the Kenai River area by Ninilchik and Happy Valley residents. The Court held that Federal Board C&T determinations must be supported by substantial evidence of a specific rural community or area’s demonstrated customary and traditional taking of a specific fish stock or wildlife population, not general species, within specific geographic locations. *Alaska v. Federal Subsistence Board* at 1094-99. The Federal Board’s determination must have a “substantial basis in fact.” *Id.* at 1094. The Court held: “Under 50 C.F.R. §100.16, C & T determinations should ‘identify the specific community’s or area’s use of specific fish stocks and wildlife populations,’ . . . and not Chistochina’s use of moose in general.” *Id.* at 1096. The Court added that the Federal Board’s “regulations clearly tie C & T determinations to the specific locations in which wildlife populations have been taken” and “each C & T **determination** must be tied to a specific community or area and a specific wildlife population.” *Id.* at 1097 (emphasis in original). The Court further emphasized: “Specific communities and areas and specific fish stocks and wildlife populations are, by definition, limited to specific geographic areas” and “a C & T determination is a determination that a community or area has taken a species for subsistence use **within a specific area.**” *Id.* at 1097-98 (emphasis in original).

As previously determined by the Federal Board, resident species fish stocks found within federal boundaries in the Kenai River area constitute distinct stocks, and residents of Ninilchik and Happy Valley have not “customarily and traditionally” taken significant numbers of those distinct stocks from that area. Any evidence of those communities’ take of the same general species of fish in other waters closer to Ninilchik and Happy Valley cannot be used to grant Ninilchik or Happy Valley C&T determinations to the specific fish stocks in the upper Kenai River area at issue. Ninilchik and Happy Valley are located far away from the upper Kenai River area. They have not historically relied on those discrete resident fish stocks for their

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subsistence needs. Given the Federal Board's prior analysis and recent pronouncements by the Ninth Circuit Court in *Alaska v. Federal Subsistence Board*, a C&T determination for the communities of Ninilchik and Happy Valley to take the specific resident fish stocks of the upper Kenai River area cannot be supported. No new information has been provided that would support reversing the Federal Board's recent determination that insufficient evidence exists to support a determination of customary and traditional use of the specific resident fish stocks within the Kenai River area by residents of Ninilchik and Happy Valley.

Opportunity Provided by State: The Kenai River area is located in the Anchorage-MatSu-Kenai Nonsubsistence area designation under State law. The State provides a broad array of personal use, recreational, and educational fisheries to meet needs for personal and family consumption as well as cultural purposes. In addition to personal use and educational fisheries for salmon, State sport fishing regulations provide adequate opportunities for harvest of rainbow/steelhead trout, lake trout, and Arctic char/Dolly Varden in addition to salmon.

Conservation Issues: No separate harvest proposal was submitted by the proponent, but, if this proposal is adopted, presumably Ninilchik and Happy Valley residents would become eligible to harvest resident species under existing federal subsistence harvest regulations which apply to residents of Hope and Cooper Landing for taking resident species in the Kenai River area. The State previously documented that resident species are easily over-harvested, and a conservative management approach has been developed by the State over time to assure harvest opportunity while sustaining these distinct, vulnerable resident stocks in the Kenai River area. Most trout fishermen in that area practice catch-and-release fishing, and the proportion of rainbow trout that are harvested in the State fishery is only about 2.4 percent. Current federal regulations providing for use of dip nets and multiple baited treble hooks and for high daily harvest and possession limits for these Kenai River area resident stocks already raise serious conservation issues that are amplified by inadequate reporting requirements. Adding a new subsistence harvest of these resident fish by Ninilchik and Happy Valley to existing federal subsistence harvests of these fish by Hope and Cooper Landing residents would significantly increase these concerns.

Department Recommendation: Oppose.¹ No new information is presented in the proposal or in the federal staff analysis which justifies reversing the 2007 Federal Board C&T determination. Granting a customary and traditional finding without substantial evidence of a prior pattern of take of specific fish stocks in a specific geographic area by a specific community would be in direct conflict with the September 23, 2008, opinion in *Alaska v. Federal Subsistence Board*. The recent federal staff analysis contains the same information, taken from the same surveys and data compilations reported in 2003-2006, that the federal staff reported before. No substantial evidence that use of the specific resident stocks in the Kenai River area by Ninilchik and Happy Valley residents satisfies the Federal Board's regulatory definition of customary and traditional use, *see* 50 C.F.R. 100.4, or the Board's regulatory factors for making a positive C&T determination for any specific resident fish stock. *See* 50 C.F.R. 100.16(b). The Federal Board previously carefully considered the relevant information and properly concluded those communities had rarely harvested or fished from those specific fish stocks in those Kenai waters.

¹ ADF&G incorporates its previous detailed submittals on this subject to the Federal Board, including those dated April 30 and May 7, 2007, and its prior RFRs in opposition to that portion of FP06-09 which the Board eventually denied.

WRITTEN PUBLIC COMMENTS

Oppose. Based on the prior analysis of the historic pattern of use and the eight criteria that are required under ANILCA and the decision to not grant C and T for freshwater water species to residents of Ninilchik, Kenai River Sportfishing Association strongly opposes this expansion of subsistence opportunity. As is the case in this situation, we cannot simply afford additional opportunity to a community that cannot demonstrate a pattern of use of those resources present within the Federally managed waters. Adoption of this proposal will detrimentally impact other users and other uses of these resources.

Subsistence opportunities for residents of Ninilchik exist under State regulations. This proposal revisits decisions already made by the Federal Board in November, 2006, and would grant residents of Ninilchik a Federal subsistence priority for freshwater species occurring in the Kenai River within the Kenai National Wildlife Refuge and the Chugach National Forest. Central to those earlier decisions was the fact that C&T could not be demonstrated for freshwater species within the Federally managed waters.

The justification provided for this proposal recognizes this activity did not occur on the allowable Federal property but asks it be allowed anyway because the Federal boundaries are not consistent with their historic patterns (areas) of use.

Kenai River Sportfishing Association